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In the

Supreme Court of the United States

October Term, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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Petitioner Arthur Andersen & Co. ("Andersen") submits this Reply Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition") and in response to arguments in opposition to the granting of the Petition raised by Respondent State of Ohio ("Ohio"), in the Brief For Respondent In Opposition, served on July 14, 1978 ("Ohio's Brief").

I

Andersen's petition does not rest, as Ohio asserts, upon the errors of fact made by the district court and the Tenth Circuit. Rather, Andersen's position is that review of the denial of due process to Andersen and the other serious errors of law by the district court and the Tenth Circuit

should not be precluded because of basic erroneous conclusions made without support in the record and contrary to the unequivocal facts of record, which were used as a basis for attempting to distinguish this case from *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Ohio implicitly concedes (Ohio's Brief, pp. 5-7) that both the district court and the Tenth Circuit erred in concluding that Andersen had violated the district court's order of December 16, 1975 and had been in violation for 18 months, which was basic to the finding of bad faith both by the district court and the Tenth Circuit. (Andersen's Petition, p. 9 and Appendix B thereto, pp. 25-29 and Supplemental Appendix to Petition, pp. S-18, S-20, S-22, S-28, and specifically at S-29).

Nor does Ohio contend, as both the district court and the Tenth Circuit erroneously concluded (Andersen's Petition, p. 9 and Appendix E thereto, pp. 52-62 and Supplemental Appendix to Petition, pp. S-6, S-21, S-27, S-28, and S-40 n. 11) that Ohio had delivered to Andersen the consent of I.O.S. Ltd. in May, 1976 (Ohio's Brief, p. 5).

These egregious errors and the other errors set forth on page 9 of Andersen's Petition and in the Appendices there cited were basic to the findings on which Ohio seeks to distinguish *Societe* and avoid a review by this Court of whether Andersen has been denied due process of law in violation of the Constitution of the United States or unlawfully punished.

Andersen's position with respect to the first of the two questions presented in its Petition is that the unique difficulties created by a foreign law/domestic law impasse (exemplified by the discovery dispute here) raise due process concerns which are not present in the typical pretrial domestic discovery dispute but which were present here and which, as a matter of law, were improperly resolved by the lower courts' decisions.

Under *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and the decisions of the Court of Appeals for the Second Circuit cited in Andersen's petition (p. 6), it is clear that, in a case in which prohibitions of foreign law impact upon the resolution of pretrial discovery disputes, due process requires: (1) that the foreign law problem be recognized and that full consideration be given to the foreign legal obstacles which confront the discovered party; and (2) that, if the domestic court determines that discovery must be made despite the foreign law prohibitions, the discovered party's obligation to comply with the court's order must be structured in a fashion permitting the party full opportunity to resolve the impasse before it faces the penalty of sanctions imposed for reasons beyond its control. These principles find express recognition in the *Restatement (Second) of the Foreign Relations Law of the United States (1965),* §§ 39-40, which urges domestic courts confronted with this type of problem to "minimize conflicts" and to "moderate the exercise of [their] enforcement jurisdiction."

Andersen's position is that the district court and the Tenth Circuit repudiated these previously uniformly recognized principles of law and that the review of their actions should not be precluded by their unsupported conclusions which are contrary to the uncontradicted record.

That the district court peremptorily ordered discovery from Geneva, Switzerland in disregard of a foreign law problem which presented obstacles to the discovery beyond Andersen's control is clearly established in the record.

At a hearing held on July 23, 1976, after Andersen had filed with the district court a detailed list of the documents which it could not then produce because it had not yet been able to obtain consents from third parties required by Swiss criminal and civil law, and after Andersen had explained to the court the Swiss legal problems it was facing and what it was doing to overcome them, the court entered the follow-

ing oral order which superseded its prior orders, including the July 2, 1976 order set forth as Appendix A to Ohio's Brief:

> "Now I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, but *in any event, with or without consents,* the Court wants full compliance by the 20th of August [1976] on these 20 or 25 documents . . ." (Emphasis added).

"[I]n any event, with or without consents" — having received the detailed opinion of Andersen's Swiss counsel explaining the applicable provisions of Swiss law, an affidavit of Andersen's American counsel describing his review with Swiss counsel of the documents in question and the advice received from Swiss counsel, and an explanation by Andersen of the work it had done and was doing to obtain the required consents or otherwise to comply with Swiss criminal and civil law, and having received no contradictory presentation by Ohio as to any aspect of Swiss law (for that matter, having received no presentation of any kind by Ohio respecting foreign law), the district court swept aside the entire foreign law issue and directed Andersen to produce, whether or not that production would violate Swiss law.*

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*In its Brief Ohio disregards the district court's order of July 23, 1976 and offers, as "proof" of a contention that the district court had *not* disregarded the foreign law problem, an *ipse dixit* recited by the district court ten months later in its order imposing sanctions:

> " '[T]he assessment of expenses and fees is not made for Andersen's failure to produce documents when such production would subject it to potential Swiss civil or criminal prosecution. Rather, the assessment is made for Andersen's unjustifiable resistance and delay in adherence to our discovery orders, which, as the passage of time has demonstrated, was totally unwarranted.' 75 F.R.D. at 23." (Ohio's Brief, p. 17).

Not only did the district court flatly order Andersen to produce documents from Switzerland "with or without consents" required in order for Andersen to avoid violating both the Swiss criminal and civil law, the district court also never undertook any analysis of Swiss law nor reached any conclusion as to the impact of Swiss law on the discovery dispute. Ohio disingenuously suggests that Andersen had a duty to respond to a comment by the district court that it was considering appointing an expert on Swiss law to advise it. The district court decided not to do so. Andersen had put into evidence the uncontradicted opinion of its Swiss counsel and had no reason to respond to the district court's comment. If anyone should have responded to such a comment, it should have been Ohio — not Andersen — as Ohio had produced nothing in respect of Swiss law.

The Tenth Circuit's affirmance of the district court's imposition of sanctions — an imposition made in the absence of any determination of how foreign law applied and impacted upon the discovery ordered — raises compelling questions of due process and conflicts sharply with this Court's decision in *Societe* and the decisions of the Court

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But what the district court *said* in its May 1977 decision cannot erase, and is squarely at odds with, what it had *done* the summer before. Moreover, the passage of time referred to by the district court was *not* measured by it from its order of May 27, 1976, which first ordered the production of the documents from Geneva, Switzerland without specifying any deadline, or from August 20, 1976, the deadline fixed by the district court, but was erroneously measured as 18 months from the date of its order of December 16, 1975 which did not order discovery of the documents in Geneva, Switzerland. (See p. 2 hereof.)

of Appeals for the Second Circuit cited in Andersen's Petition (p. 6).*

The conflict between the decisions of which review is here sought and the cited decisions of the Court of Appeals for the Second Circuit is no less real because, as Ohio seems to suggest (Brief, pp. 16-17), in most of the cited decisions the foreign law problem was dealt with at a stage in the litigation preceding a request for the imposition of sanctions, whereas the decisions of which review is here sought involved the imposition of sanctions. If anything, the fact that other courts gave far more meaningful consideration to the "foreign law" problem at a less serious stage of the litigation of the issue than the consideration given to the problem by the district court here — at a *more serious* stage — supports, rather than diminishes, Andersen's due process claim.

The pretrial imposition of sanctions, in the context of a foreign law discovery dispute, violated due process principles established by this Court in *Societe, supra.* The undisputed facts of record here are that despite Andersen's obtaining of all of the consents required by Swiss law and its full production of all ordered discovery before *even the scheduling* of a trial date, Andersen was sanctioned (by a preclusion

*See *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972) (district court decided substantive issues of Swiss banking secrecy law and directed that the discovered party need not make the disclosures sought; circuit court reviewed Swiss legal question *de novo* and affirmed); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968) (district court determined substantive issues of German law and directed party to comply with a grand jury subpoena, on the ground that it had shown, not that compliance would subject it to criminal sanctions or their equivalent under German law, but only that there was a "remote and speculative possibility" that it might incur civil liability; circuit court reviewed German legal issues and affirmed); *Application of Chase Manhattan Bank*, 297 F.2d 149 (2d Cir. 1960) (district court determined substantive issue of Panamanian law and directed that party would not be required to produce documents from Panama in response to a grand jury subpoena; circuit court affirmed); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (district court refused to quash subpoenas requiring production of documents from Canada; circuit court modified order, noting but not resolving conflict of theories between Canadian counsel as to Canadian law, and held that production of documents from Canada would not be ordered and that, to seek such documents, subpoenaing party should proceed via letters rogatory so Canadian law issues could be resolved by Canadian court); *First National City Bank v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (district court modified IRS summons to exclude production of documents from Panama; circuit court analyzed Panamanian legal issue and reversed on ground that, while production in violation of Panamanian law should not be ordered, discovered party had not shown that Panamanian law actually forbade disclosure).

order which will affect its rights to fully contest its adversary's claims at trial) for conduct related to its production from abroad. In startling contrast, this Court in *Societe* indicated that petitioner's failure to comply there with an order directing discovery from abroad possibly could be sanctioned, *if at all,* only upon trial of the case. Indeed, that the holding in *Societe* manifested this Court's view that important due process concerns invariably are raised in the foreign law discovery area, even seems to be conceded by Ohio (Brief, p. 17). But rather than answer these concerns Ohio seemingly asserts that in this case, allegedly unlike *Societe* where the " 'foreign law' question was at least demonstrable" (Ohio's Brief, p. 16), questions of due process become irrelevant because,

> "no Swiss official has ever expressed the slightest interest in any of the documents sought by Ohio in any phase of the discovery controversy." (*Ibid.*)

The point is meritless, except to demonstrate that Andersen was warranted in concluding that the risk of criminal prosecution for disclosures of the business secrets of others was remote once it had obtained, from all those who could have filed a criminal complaint against it for unauthorized disclosure, their written consents to such disclosure, and that

Switzerland had no separate state interest to vindicate; and that Andersen's decision to produce the documents from Geneva, Switzerland with those consents in hand was *not* an abandonment of its Swiss law contention, as the lower courts erroneously concluded. Until Andersen obtained such consents, at a cost to it in excess of $71,000, it had a legitimate "fear of criminal prosecution," which this Court in *Societe, supra,* 357 U.S. at 211, stated "constitutes a weighty excuse for non-production."

The lower courts' treatment of the foreign law problem with which they were presented constituted a drastic departure from the principles of law established by all relevant precedent and resulted in unfair and unconstitutional punishment of a civil-litigant-defendant for delays in the making of discovery beyond its control.

II

The second question presented by Andersen in its Petition concerns the proper functions of the federal discovery sanctions rule, Rule 37, F.R. Civ. P., and what, if any, constitutional constraints must limit a court's exercise of power under that rule in light of this Court's decision in *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976).

Before *National Hockey League* the uniformly accepted construction of Rule 37 was that any sanctions imposed under the rule must in some rational way be related to, and justified by, the effectuation of the discovery process in a particular case. (See, *e.g.,* cases cited in Petition, pp. 10-11, and also, *e.g., Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); *Metropolitan Greetings, Inc. v. Michael McDonough, Inc.,* 60 F.R.D. 58 (E. D. Pa. (1973)). That the imposition of "discovery" sanctions, to be valid and proper, must be for the purposes of fulfilling and furthering the discovery process and not for purposes of imposing punishment was first stated by this Court in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909), and later found explicit recognition in *Societe, supra,* 357 U.S. at 209, 210, and was expressly cited, as well, by the drafters of Rule 37. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 37, p. 225.

In Andersen's view this Court's decision in *National Hockey League* did not signal a departure from this earlier teaching. But the lower courts in this case, in the decisions of which review is here sought, concluded that *National Hockey League did* signal such a departure and held that this Court has established, as a new principle, that discovery sanctions are to be imposed as punishment and for their putative deterrent effect. Legal commentary, also, has opined that *National Hockey League* stands for such new and far-reaching principles. "The Emerging Deterrence Orientation In The Imposition Of Discovery Sanctions," 91 Harvard L. Rev. 1032, 1038-1040 (1978). And numerous cases decided since *National Hockey League* reflect both an uncertainty regarding that decision and the potentially far-reaching and unsettling impact upon sanctions proceedings of the Court's decision in that case.*

The instant case — presenting as it does a clear-cut situation in which ordered discovery was fully made, no substantive prejudice was established, but severe sanctions

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*Ohio (Brief, pp. 17-18) faults Andersen for not having discussed in its Petition any specific cases decided since *National Hockey League* which reflect what Andersen claims is the uncertainty as to the proper role of Rule 37 left in the wake of *National Hockey League.*

The fact that *National Hockey League* may have a potentially monumental impact upon future federal civil litigation is so clear, however, as to render unnecessary a detailed analysis of the cases already decided by the Courts of Appeals since *National Hockey League.* The following cases exemplify the problem. *Dellums v. Powell,* 566 F.2d 231, 235 (D.C. Cir. 1977) (the court referring to *National Hockey League* as adding a "further consideration" —a "prophylactic" one—to be accounted for in determining the propriety *vel non* of discovery sanctions, and appearing to say

were imposed for deterrent purposes — presents an opportunity for this Court to further address the important federal procedural questions referred to in *National Hockey League* and to establish firm principles which will avoid conflicting decisions as to the application of Rule 37 in the future.

In response to Andersen's contention, Ohio appears to quarrel with the assertion that the question presented here is a question of law, stating, for example, that the propriety of the imposition of sanctions upon Andersen "necessarily depend[s] upon the facts of this case . . . ." (Ohio's Brief, p. 13). Ohio then seems to contend that, while Andersen may have made all ordered discovery, its delay in production *did* "prejudice" Ohio (*id.*, p. 15), and that sanctions were imposed for reasons other than "punishment" of Andersen.

These claims, however, are exercises in semantics which miss, or beg, the point. For example, Ohio's argument that Andersen's alleged delay in discovery did result in "prejudice" is stated as follows:

> "Expenditure not just of money but of time and attention caused by the need virtually to extract discovery from an unwilling party was prejudicial to Ohio in this case . . . ." (Ohio's Brief, p. 15).

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that, under *National Hockey League*, the "prophylactic" consideration alone will support a dismissal of claims); *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977) (the court seemingly holding that a finding of prejudice resulting from a charged failure of discovery still remains a necessary predicate for the imposition of sanctions); *Affanato v. Merrill Bros.*, 547 F.2d 138 (2d Cir. 1976) (the court quoting extensively from *National Hockey League* and affirming, without discussion of whether there had been prejudice, entry of a default judgment for failure to make discovery); *Emerick v. Fenick Industries*, 539 F.2d 1379 (5th Cir. 1976) (the court quoting from *National Hockey League* and affirming, without discussion of whether there had been prejudice, the striking of a defendant's answer for failure to make discovery).

Without gainsaying the fact that Ohio's counsel expended time and energy in litigating the discovery issues in dispute, it remains clear that this alleged form of "prejudice" is not that which has been traditionally required as the reasoned and constitutional basis for an imposition of a preclusionary sanction — this "prejudice" is not substantive prejudice hampering a party's trial of its case on the merits because of its adversary's failure to make discovery, see *Societe, supra; Hammond Packing Co., supra.**

Similarly without merit are Ohio's recitations to the effect that the district court allegedly did not punish Andersen but, in imposing sanctions, did something else and something permissible. Thus, Ohio emphasizes the district court's statements that sanctions were imposed for purposes of maintaining " 'the integrity of the instant suit' " (Ohio's Brief, p. 14), that Andersen's alleged conduct respecting two matters unrelated to the Geneva documents dispute was " 'indicative of Andersen's response to the duties of good faith' " (*id.*, pp. 14-15), and that Andersen's sanc-

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*The nature of the "prejudice" required to support the imposition of sanctions is that described in this Court's seminal statement in *Hammond*:

> "The essential basis for the exercise of power, and not a mere incidental result, arising from its exertion, is the criterion by which its validity is to be measured. Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. *In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure*

tioned conduct allegedly had "prejudiced" litigants in other cases (*id.*, p. 15). But these are simply different ways of stating that Andersen was sanctioned, *not* for a failure of discovery which operated to the prejudice of its adversary in this case, but rather for assorted acts of "bad faith" and as an example to others. No matter how the district court characterized the action it was taking, the principal effect and purpose of the action was to "punish" Andersen — which courts have held is not the purpose to be served by the imposition of Rule 37 sanctions.

Apart from the above contentions, Ohio's response to Andersen's due process claim is to re-state it (wrongly) and then claim that the principle of law which Andersen advances *never* has been, and should not be, the law. Apparently Ohio reads *Societe* as recognizing "due process" concerns in the discovery context only when the sanction imposed has been the sanction of dismissal or default judgment and, even then, only if the trial court has found "good faith" on the part of the sanctioned party:

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to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode described by law." (212 U.S. at 350-351; emphasis added).

> "Mr. Justice Harlan's discussion of due process limitations on Rule 37 sanctions in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), was in the context of a dismissal sanction, imposed upon a party who had unquestionably made a good faith effort to comply with a court order." (Ohio's Brief, p. 16).

But there is no logic or sense in insisting that trial courts adhere to constitutional safeguards only if they are bent upon imposing the "most severe" sanction, but leaving them free to disregard constitutional principles if they "merely" enter "preclusion" orders and assess fines. Ohio's related thesis that the district court need not concern itself with following a regime of reasoned order and due process once it pronounces a finding of "bad faith", is equally illogical and unfair. The dangers of permitting a trial court, simply on the basis of a finding of "bad faith", to ignore the procedural framework established in *Hammond* and re-affirmed in *Societe* are manifest.*

Finally, Ohio builds upon its erroneous restatement of Andersen's position a faulty *in terrorem* argument:

> "Before addressing these questions, it must be noted that the doctrine for which Andersen here argues,

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*The cases cited by Ohio (Brief, p. 18) in support of its argument do not in any way contravene Andersen's position as to the principles established by *Hammond* and *Societe*. Ohio says that in *Diapulse Corp. v. Curtis Pub. Co.*, 374 F.2d 442 (2d Cir. 1967), the Second Circuit "upheld the trial court's dismissal of a complaint when requested documents had been tendered for inspection twenty days late." (*Ibid.*). But, the crucial fact in *Diapulse* which led to dismissal was not that documents had been tendered late, but that the plaintiff had refused to comply with an order requiring the copying of documents. In the Second Circuit's view there had been "no true compliance with [the district court's] order at any time" (*id.* at 446)—not, as here, an alleged delay in compliance. Similarly, in *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976), the sanctioned party, *inter alia*, had made only very incomplete production, and in *Margoles v. Johns*, No. 76-1293 (7th Cir., Oct. 14, 1976), the trial court specifically found that the "failure to produce" had been "prejudicial" (*id.* at 3).

as the courts below recognized, would defeat the fundamental purpose of the Federal Rules 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1, Fed. R. Civ. P. For Rule 37 would be meaningless if an affluent party could defy discovery orders and misrepresent important facts, with the complete confidence that if it eventually 'complied' it could buy its immunity from Rule 37 sanctions by, at most, paying its opponent's attorney's fees." (Ohio's Brief, pp. 13-14).*

But it is not Andersen's position that a party guilty of "bad faith" is or should be free from *any* court-imposed sanction on the theory that its ultimate compliance makes sanctions imposed under Rule 37 improper. Such "bad faith" can be (and properly must be) sanctioned by exercise of the court's contempt powers. If what the trial court really intends to punish a party for is interfering with the "integrity" of a lawsuit the proper vehicle is a contempt proceeding, not a purported imposition of "discovery" sanctions under Rule 37; indeed, the very purposes cited by the district court (and by Ohio now) as having been served by the imposition of the "discovery" sanctions, *i.e.*, the preservation of the court's "integrity" and the "deterrence" of other parties to other cases, are the *precise* purposes which the criminal contempt proceeding is deemed to serve:

> "The object of a criminal contempt proceeding is to vindicate the authority of the court and to deter similar derelictions." (3 Wright, *Federal Practice and Procedure: Criminal*, §702 (1969)).

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*Ohio's invocation of the policy statement contained in Rule 1, F. R. Civ. P., is ironic. At the heart of Andersen's position that the novel principles relied on by the lower courts to justify the imposition of sanctions here are wrong, is the contention that those principles are not "just", and do not permit the "just determination" of a case, within the meaning of Rule 1.

Furthermore, if the trial court employs the contempt mechanism, the accused party is afforded procedural safeguards required in that type of a proceeding, *e.g.*, being informed of what the charges against it are, having an opportunity to produce witnesses and cross-examine witnesses called to testify concerning its alleged "bad faith", and the type of unfairness visited upon Andersen here would not occur.

CONCLUSION

For the reasons set forth above and in Andersen's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit, the Petition should be granted.

Respectfully submitted,

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